Supreme Court, U.S.
FILED

No. _____ (1)

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In The Supreme Court Of The United States

OCTOBER TERM, 1996

RANDY RAY CLUTE,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a court with original jurisdiction over a criminal offense violate a defendant's rights to a fair trial when the court permits the prosecution to introduce evidence of the defendant's prior conviction of a similar offense?

2. Whether a court, under Jackson v. Denno, must conduct a hearing on "voluntariness" and another separate hearing on "custody", when "custody" is just one of the factors a court reviews when determining "voluntariness"?

3. Does a court's admission of a videotape, including the audio portions, violate a defendant's rights against self-incrimination, when the videotape contains the defendant's non-Mirandized admissions?

4. Is a law enforcement officer required to give a defendant his Miranda warnings when the defendant is within the officer's care, custody, and control?

PARTIES TO THE PROCEEDING

The party to the proceeding in the South Carolina Court of Appeals and, thereafter, in the South Carolina Supreme Court, is in the caption (appellant in Case No. 94-GS-22-460). No other party, other than Randy Ray Clute, in involved.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

RANDY RAY CLUTE,

Petitioner,

against

THE STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF SOUTH CAROLINA

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the South Carolina Court of Appeals entered in this action on November 4, 1996 (App.1-17), as followed by the May 27, 1997, denial of a Writ of Certiorari filed with the South Carolina Supreme Court. (App.18).

OPINIONS BELOW

The decision of the South Carolina Court of Appeals is reported at 480 S.E.2d 85 (S.C. App.

1996). (App.1-17). The Court of Appeals later denied a Petition for Rehearing on December 31, 1996, in an unpublished order. (App.19). The South Carolina Supreme Court subsequently denied a Petition for Writ of Certiorari on May 27, 1997, in an unpublished letter/order. (App.18).

BASIS FOR JURISDICTION

The final judgement of the South Carolina Court of Appeals was entered on November 4, 1996, and the South Carolina Supreme Court entered its denial of a Writ of Certiorari on May 27, 1997. This Court has jurisdiction to review the judgments of the South Carolina Court of Appeals and the South Carolina Supreme Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment 5:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

South Carolina Constitution, Article I, § 3:

> The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

South Carolina Constitution, Article I, § 12:

> No person shall be . . . compelled in any criminal case to be a witness against himself.

South Carolina Code Annotated, § 22-3-540 (Law. Co-op. 1989):

> Magistrates shall have exclusive jurisdiction of all criminal cases in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days . . . .

South Carolina Code Annotated, § 22-3-540 (Law. Co-op. 1989):

> A person violating a provision of Section 56-5-2930, upon conviction . . . must be punished in accordance with the following:
> (1) By a fine of two hundred dollars or imprisonment for not less than forty-eight hours nor more than thirty days, for the first offense. .

STATEMENT OF THE CASE

This appeal involves the question whether a police officer, who has already decided to arrest a suspect, may use a traffic stop as a pretext to obtain incriminating evidence from the suspect prior to advising the suspect of his rights against self-incrimination under Miranda v. Arizona. In addition, this case also involves the question whether a court violates a defendant's right against self-incrimination by admitting a videotape, including audio portions, when the videotape contains admissions by the defendant and the officer did not advise the defendant of his Miranda rights. Finally, this appeal concerns whether South Carolina's

requirement of separate court hearings on "voluntariness" and "custody" is permitted under Jackson v. Denno.

Procedural History Of The Case

The Petitioner, Randy Ray Clute ("Mr. Clute"), was arrested for DUI, tried before a jury, and convicted. (App.2). He was sentenced 1 year imprisonment and a $3,000.00 fine. (App.2). The sentence was suspended on 4 years probation, a monetary fine, court costs, and 10 days public service. (App.2).

On appeal, the South Carolina Court of Appeals affirmed the trial court. (App.1-17). Mr. Clute filed a Petition for Rehearing which was denied on December 31, 1996. (App.19). He then filed a Petition for Writ of Certiorari with the South Carolina Supreme Court which was denied on May 27, 1997. (App.18).

Relevant Factual History

In April 1994, a Georgetown City Police Department officer stopped Mr. Clute's vehicle (App.2) because he believed the vehicle's driver had been drinking. (App.21). Mr. Clute was not

free to leave once he provided his driver's license and motor vehicle registration to the officer. (App.22).

The officer said when he smelled alcohol and observed Mr. Clute's driving he had sufficient probable cause for an arrest. (App.23). The officer also said he had sufficient probable cause to arrest Mr. Clute prior to administering the field sobriety tests. (App.20-23). Mr. Clute, in turn, said in the Jackson v. Denno hearing he believed he was under arrest and not free to leave when the officer approached his vehicle to ask him questions. (App.24). Mr. Clute said he believed he was required to obey the officer's commands when the officer asked him to say something or do something. (App.24-25).

The officer put Mr. Clute through a roadside custodial interrogation and administered several field sobriety tests. Mr. Clute moved to suppress any statements he made because they were not "voluntary." (App.2-4). The judge denied the motion finding Mr. Clute was not in the officer's "custody". (App.3-7).

Mr. Clute did not stipulate the DUI charge was a second offense as the State did not have to

prove jurisdiction. (App.3, 9-11). The State attempted to prove Mr. Clute's previous conviction (App.9-11) by introducing his driving record (App.26-29) and a Notice of Suspension (App.29-30) which contained evidence of a previous DUI conviction. (App.26-30). Mr. Clute moved unsuccessfully to suppress the evidence. (App.3, 9-11).

Mr. Clute also unsuccessfully moved to suppress the officer's videotape custodial interrogation as the officer had advised him of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). (App.3, 7-8). When Mr. Clute renewed the motion post-verdict (App. 3, 7-8), the judge ruled admission of the videotape, even thought it contained Mr. Clute's non-Mirandized statements, while incorrect constituted harmless error. (App.3, 7-8).

REASONS FOR GRANTING THE WRIT

The petitioner cites four (4) independent grounds to grant his Writ of Certiorari. *First*, the South Carolina appellate courts' allowance of evidence of a defendant's prior criminal conviction in a pending case for the same or very

similar offense denies the defendant a fair trial and conflict's with Old Chief v. United States. *Second*, the South Carolina appellate courts' interpretation of Jackson v. Denno creates an additional procedural step for a court determining the "voluntariness" of a defendant's self-incriminating statements made to law enforcement. This added step conflicts with Jackson v. Denno's procedures. *Third*, the South Carolina appellate courts' allowance of a videotape containing a defendant's non-Mirandized self-incriminating statements conflicts with this Court's decisions. *Lastly*, the South Carolina appellate courts' determination to sanction a police officer's failure to advise a defendant of his Miranda rights, when the defendant in under the officer's custody and control and believes he is under arrest, conflicts with this Court's decisions.

I. A COURT WITH JURISDICTION OVER A CRIMINAL OFFENSE VIOLATES A DEFENDANT'S RIGHTS TO A FAIR TRIAL WHEN IT PERMITS THE PROSECUTION TO INTRODUCE EVIDENCE OF A SIMILAR PRIOR CONVICTION.

In 1991, Mr. Clute was arrested for and convicted of DUI in Louisiana. (App.25-28).

Almost three (3) years later he was arrested for DUI in South Carolina. In the South Carolina case the court admitted evidence of Mr. Clute's prior conviction. This violated Mr. Clute's rights to a fair and impartial trial.

Mr. Clute declined to stipulate his pending DUI charge was a second offense (App.3, 9-11) as South Carolina law did not require the State to prove the court's jurisdiction. The State sought to prove Mr. Clute's previous DUI conviction (App.9-11) by introducing his driving record and a Notice of Suspension. (App.3, 9-11, 26-30). The driving record contained an indication of his prior DUI conviction. (App.26-30). Mr. Clute moved to suppress the evidence since the court had clear jurisdiction over a first offense DUI case. (App.3, 9-11).

In State v. Leonard, 287 S.C. 462, 339 S.E.2d 159 (1986), reversed on other grounds, 292 S.C. 133, 355 S.E.2d 270 (1987)., the Court of Appeals held a trial court had "general criminal jurisdiction unless exclusive jurisdiction has been given to an inferior court." Id., 287 S.C. 462, 472-473, 339 S.E.2d 159, 165 (citing S. C. Constitution, Article V, § 7). The Court stated a "magistrate's court[] ha[s] exclusive

jurisdiction over criminal cases [where] the punishment does not exceed a fine of $100.00 or thirty days in jail . . . ." Id., 287 S.C. 462, 473, 339 S.E.2d 159, 165 (quoting S.C. Code Ann. § 22-3-540 (Law. Co-op. 1989)). The penalty for DUI 1st is a $200.00 or 30 days in jail. See S.C. Code Ann. § 56-5-2940(1) (Law. Co-op. 1991).

Since the penalties for DUI 1st exceeded the jurisdictional amounts conferring exclusive jurisdiction on magistrate's court, under Leonard and S.C. Code Ann. § 22-3-540, a South Carolina Court of General Sessions properly exercises original concurrent jurisdiction over the matter. See State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676 (1982); Leonard, 287 S.C. 462, 474, 339 S.E.2d 159, 165.

Mr. Clute argued the Louisiana conviction should be limited only to the issue of sentencing should he be convicted of the pending offense. Furthermore, he asserted, even if the prior conviction was admissible to prove jurisdiction, the trial judge, under State v. Outlaw, 304 S.C. 347, 404 S.E.2d 516 (Ct.App. 1991), reversed on other grounds, 307 S.C. 177, 414 S.E.2d 147 (1992), should give a curative instruction as to the limited purpose for which the jury should

consider the prior conviction. Both motions were denied.

The Court of Appeals has held when evidence of other crimes was admitted for a specific purpose, a judge was required to give a limiting instruction so the jury would consider the evidence only for the purpose for which it is offered. State v. Anderson, 318 S.C. 395, 399, 458 S.E.2d 56, 58 (1995). The Court of Appeals also noted "the jury [in Anderson] was instructed '[to] limit . . . consideration of [a] prior convictions by [sic] the defendant only . . . to establish . . . [the Court's] jurisdiction . . .'" Id., 318 S.C. 395, 399, 458 S.E.2d 56, 58 (quoting State v. Johnson, 306 S.C. 119, 123, 410 S.E.2d 547, 549 (1991)) (Second alteration in original).

This Court recently addressed this issue in Old Chief v. United States, ___ U.S. ___, 117 S.Ct. 644 (1997). In Old Chief, the defendant was charged with, *inter alia*, possession of a weapon by a felon. Id., ___ U.S. ___, ___, 117 S.Ct. 644, 647. Mr. Old Chief was subsequently convicted of the possession charge based, in part, on the Government's introduction of evidence of his prior conviction for assault

causing serious bodily injury. Id., ___ U.S. ___, ___, 117 S.Ct. 644, 647-648. He appealed and the Ninth Circuit affirmed. Id., ___ U.S. ___, ___, 117 S.Ct. 644, 648-649; however, this Court reversed the judgment and remanded. Id., ___ U.S. ___, ___, 117 S.Ct. 644, 649, 656.

This Court states "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Id., ___ U.S. ___, ___, 117 S.Ct. 644, 650 (citing 1 J. Weinstein; M. Berger & J. McLaughlin, Weinstein's Evidence, para. 403[03] (1996)). This Court recognized "'[e]vidence of other crimes [was] not admissible to prove the character of a person in order to show action in conformity therewith.'" Id., ___ U.S. ___, ___, 117 S.Ct. 644, 651 (citing Rule 404(b), FRE) (South Carolina evidentiary law on this issue is essentially the same as the Federal Rules of Evidence. See State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923). See also State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991)).

Consequently, this Court stated

> . . . there can be no question that evidence of the name or the nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case . . . . but will be substantial whenever the official record offered by the government would be arresting enough to lure a juror into a sequence of bad character reasoning. Where a prior conviction was for . . . one similar to [the same offense charged in the] pending case the risk of unfair prejudice would be especially obvious
>
> . . . .

Id. ___ U.S. ___. ___. 117 S.Ct. 644, 652 (Emphasis added).

South Carolina Courts of General Sessions and magistrates courts have concurrent jurisdiction over DUI 1st cases. A jury should not determine whether the court has proper jurisdiction over a pending case. See Bridges v. Wyandotte Worsted Co., 243 S.C.2d 1, 132 S.E.2d

19 (1963). Jurisdiction in a DUI case is only relevant for sentencing purposes.

Herein, even though the State knew the court had jurisdiction, it still sought to introduce Mr. Clute's driving record. There was no other reason for this evidence except to get the prior conviction before the jury to demonstrate he was a bad person and guilty of the pending charge. This evidence was unduly prejudicial and resulted in an unfair trial. This Court should grant Mr. Clute's Petition for Writ of Certiorari to order reverse the judgment and remand this case.

II. JACKSON V. DENNO DOES NOT REQUIRE SEPARATE HEARINGS ON "VOLUNTARINESS" AND "CUSTODY", AS "CUSTODY" ISSUE IS SIMPLY ONE OF THE MANY FACTORS A COURT CONSIDERS WHEN DETERMINING "VOLUNTARINESS"

When the State sought to use Mr. Clute's "voluntary" statements to the officer against him, Mr. Clute moved for a Jackson v. Denno hearing. The judge conducted an *in camera* hearing to determine the admissibility of Mr. Clute's statements, purporting to determine (a) whether Mr. Clute was in custody at the time; (b) whether Mr. Clute's statements were

incriminating; and (c) whether M. Clute freely and voluntarily made the statements, together with whether Mr. Clute knowingly waived his right to remain silent. See State v. Silver, 307 S.C. 326, 414 S.E.2d 813 (Ct.App. 1992), affirmed as modified, 314 S.C. 483, 431 S.E.2d 250 (1993).

In addition, involuntary statements must be suppressed, Jackson, 378 U.S. 368, and the judge reviews the totality of the circumstances surrounding the defendant's utterance/statement in determining its admissibility. State v. Doby, 273 S.C. 704, 258 S.E.2d 896 (1979).

A defendant has a "constitutional right . . . to object to the use of [a] confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." Jackson, 378 U.S. 368, 376-377 (citing Rogers v. Richmond, 365 U.S. 534 (1961)). South Carolina follows this position. See State v. Register, ___ S.C. ___, ___, 476 S.E.2d 153, 156 (1996).

Consequently:

> Whenever evidence is introduced that was allegedly obtained

> [unconstitutionally], the defendant is entitled to have the trial judge conduct [a non-jury] evidentiary hearing at the threshold point to establish circumstances under which [the evidence] was gained.

State v. Creech, 314 S.C. 76, 84, 441 S.E.2d 635, 639 (Ct.App. 1994). The Court of Appeals has also held a defendant did not have to show custody to be entitled to a Jackson v. Denno hearing on the "voluntariness" of a statement. Creech, 314 S.C. 76, 84, 441 S.E.2d 635, 639-640. Instead, "custody" was simply a factor the court considered in determining "voluntariness". Id., 314 S.C. 76, 86, 441 S.E.2d 635, 640 (citing Silver, 314 S.C. 483, 431 S.E.2d 250). See also State v. Blassingame, 271 S.C. 44, 244 S.E.2d 528 (Ct.App. 1978). Additionally, where the is an evidentiary conflict as to a defendant's statements, the court must make a finding as to the validity of the statements. See Creech, 314 S.C. 76, 86, 441 S.E.2d 635, 640. See Silver, 307 S.C. 326, 414 S.E.2d 813.

The evidence herein conflicted on whether Mr. Clute said anything incriminating to the police officer. Mr. Clute moved to exclude the

alleged incriminating statements due to (a) their incriminating nature, (b) the lack of Miranda warnings, and (c) Mr. Clute's custodial status when the statements were allegedly made. The trial judge held a Jackson v. Denno hearing to address Mr. Clute's alleged statements. (App.5-7).

The Court of Appeals said "after the trial [judge] ruled . . . Clute was not in custody for purposes of Miranda, Clute failed to [move again for the second inquiry and] request a specific ruling as to the [issue of the] voluntariness [of Mr. Clute's statement] pursuant to Jackson v. Denno." (App.6). This decision by the Court of Appeals has created a **two (2) step** procedure for Jackson v. Denno hearings not heretofore previously required by either this Court or by the South Carolina appellate courts. This new procedure conflicts with the principle the "in custody" determination merely constituted a factor to be considered in determining voluntariness. That principle was not, as it is now under Clute, the principle focus of a totally separate hearing.

The South Carolina Court of Appeals improperly created an additional step in the

Jackson v. Denno hearing procedure not previously required. A trial court's determinations of "custody" and "voluntariness" are made in a single, yet comprehensive, hearing. In this case the trial judge simply addressed the issue of "custody." Once he found "custody" he did not address the "voluntariness" issue.

This Court should grant Mr. Clute's Petition for Writ of Certiorari to order reverse the judgment and remand this case.

III. A TRIAL COURT'S ADMISSION OF A INTERROGATION VIDEOTAPE, TOGETHER WITH THE AUDIO PORTIONS, VIOLATES A DEFENDANT'S RIGHTS AGAINST SELF-INCRIMINATION WHEN THE VIDEOTAPE CONTAINS THE DEFENDANT'S NON-MIRANDIZED ADMISSIONS

After Mr. Clute was arrested, the officer videotaped Mr. Clute doing several field sobriety tests. Even though Mr. Clute was never given his Miranda warnings, the trial judge admitted the videotape, including the audio portions, into evidence. The South Carolina Court of Appeals held this admission of this incriminating evidence was, at worst, harmless error. (App.2, 6-7).

During post-trial motions, the judge admitted he was wrong in admitting the audio portion of the videotape. (App.2, 6-7). The judge, however, affirmed the verdict stating the error was, at worst, harmless. (App.2, 6-7). The Court of Appeals agreed indicating "[t]he videotaped evidence [wa]s cumulative to [the officer's] properly admitted evidence regarding [Mr.] Clute's inability to recite the alphabet." (App.8). In addition, the Court of Appeals held

> having viewed the videotape, we agree with the trial court that the physical, nontestimonial evidence outweigh[ed] any prejudice from the recitation of the alphabet inasmuch as [Mr. Clute] [was] visibly intoxicated on the videotape.

(App.8).

Under this Court's and applicable South Carolina precedents, however, "harmless error" is defined as an error for which there is no reasonable probability the error (i.e., the admitted evidence) contributed to the particular defendant's conviction of a crime. See Chapman v. California, 386 U.S. 18 (1967); Caulder, 287

S.C. 507, 339 S.E.2d 876; State v. Henderson, 286 S.C. 465, 334 S.E.2d 519 (Ct.App. 1985).

A review of the record shows a clear a presumption the videotape (with the audio) negatively impacted the jury and the jury's deliberation process against Mr. Clute. See Thompson v. Leeke, 590 F.Supp. 110 (D.S.C. 1984), affirmed, 756 F.2d 314 (4th Cir. 1985); Caulder, 287 S.C. 507, 339 S.E.2d 876. The admission of the videotape was harmless only if it was harmless beyond a reasonable doubt. See Chapman, 386 U.S. 18. In this case, there was no reasonable doubt the jury did not use Mr. Clute's self-incriminating statements and actions to convict him of DUI.

Even assuming, *arguendo*, Mr. Clute was "visibly intoxicated on the videotape . . . ," (App.8), the admission of the audio portion only could have significantly enhanced the jury's perceptions Mr. Clute **was, in fact, drunk**. Absent Mr. Clute's own "spoken words", some jurors may have believed Mr. Clute was merely ill or otherwise indisposed. This we can never know. The jury, hearing Mr. Clute's inability to recite two (2) letters of the alphabet and knowing, moreover, he had a prior DUI conviction, could

only have been improperly predisposed to believe Mr. Clute had simply done it again.

Mr. Clute undisputedly gave verbal responses to the officer's questions without having been advised of his Miranda rights. The officer videotaped those responses and used them as evidence against Mr. Clute. Consequently, the videotape evidence was not, beyond a reasonable doubt, harmless error. The Court of Appeals should have determined the videotape was, at a minimum, highly prejudicial to Mr. Clute. This Court should grant Mr. Clute's Petition for Writ of Certiorari to order reverse the judgment and remand this case.

IV. WHEN A CRIMINAL DEFENDANT IS WITHIN A LAW ENFORCEMENT OFFICER'S CARE, CUSTODY, AND CONTROL THE OFFICER MUST ADVISE THE DEFENDANT OF HIS MIRANDA RIGHTS

The officer stopped Mr. Clute on the side of the road, suspecting he was driving his motor vehicle while under the influence of alcohol. (App.20). The officer, who admittedly intended to arrest Mr. Clute (App.20-22), detained Mr. Clute and would not permit him to leave the scene of the stop. (App.20). Moreover, Mr. Clute believed he was under the officer's control, not

free to leave, required to respond to the officer's questions, and required to participate in the field sobriety tests. (App.24-25).

Under this Court's prior cases, it is axiomatic Miranda's "safeguards . . . [apply] as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" Berkemer v. McCarty, 468 U.S. 420, 440 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983) (*per curiam*)). Since Mr. Clute, "detained pursuant to a traffic stop . . . [, was] subjected to treatment [rendering] him 'in custody' for [all] practical purposes, [Mr. Clute was] entitled to [Miranda's full] protections . . . ." Berkemer, 468 U.S. 420, 440 (citing Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (*per curiam*)). Consequently, "the only relevant inquiry [wa]s how a reasonable [person **in Mr. Clute's**] position would have understood his [custodial] situation." Berkemer, 468 U.S. 420, 442 (citing Beckwith v. United States, 425 U.S. 341, 346-347 (1976); United States v. Caiello, 420 F.2d 471, 473 (2d Cir. 1969), cert. denied, 397 U.S. 1039 (1970); People v. P., 2[illegible] N.Y.2d 1, 9-10, 286 N.Y.S.2d 225, 232, 233 N.E.2d 255, 260 (1967)) (Emphasis added). See also

Pennsylvania v. Bruder, 488 U.S. 9, 12 (1988) (Stevens, J., with whom Marshall, J., joins dissenting) (*per curiam*).

Similarly, South Carolina defines a "[c]ustodial interrogation [as] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." State v. Peele, 298 S.C. 63, 65, 378 S.E.2d 254, 255 (1989) (citing Miranda, 384 U.S. 436) (Emphasis added). Therefore, "Miranda warnings are applicable . . . where there has been such a restriction on a person's freedom as to render him in custody." Peele, 298 S.C. 63, 64-65, 378 S.E.2d 25, 255 (citing State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984); Doby, 273 S.C. 704, 258 S.E.2d 896).

In this case, there was ample evidence the officer's field sobriety tests constituted a sustained interrogation of Mr. Clute which was later used solely for the purpose of incriminating Mr. Clute. (App.20). It is clear from the record (a) the officer had restricted Mr. Clute's movements (App.20-23); and (b) Mr. Clute reasonably believed he was in custody. (App.24-25). See Miranda, 384 U.S. 436; Peele,

(App.23-24). See Miranda, 384 U.S. 436; Peele, 298 S.C. 63, 378 S.E.2d 254. Contrary to the evidence, the judge (with the appellate courts' concurrence) found Mr. Clute . . . "was not under arrest . . . ." The officer's evidence, however, was he had sufficient probable cause to arrest Mr. Clute prior to field sobriety tests.

The South Carolina Criminal Justice Academy teaches law enforcement officers they are not required to advise individuals of their Miranda warnings during "traffic stops" or "traffic stop" investigations. Officers are also taught they may conduct any "investigation" they believe appropriate as long as they testify, if and when challenged, they were simply conducting an investigation into the stop or the accident and the individual driver was merely being "*detained*" pending conclusion of the investigation. Moreover, with the potential criminal penalties available for DUI, an officer's presence and his DUI investigation shows he is not engaged in a mere routine traffic stop, especially since the most likely immediate result for the DUI suspect is incarceration.

The judge apparently failed to review or weigh the facts to determine if Mr. Clute's

so-called **ordinary** traffic stop and whether he was subjected to restraints comparable to those associated with formal arrest. See Berkemer, 468 U.S. 420; Bruder, 488 U.S. 9; Peele, 298 S.C. 63, 378 S.E.2d 254.

Compounding the trial court's error, South Carolina appellate courts determined there were no "extraordinary . . . circumstances surrounding the [officer's traffic stop of or] the administration of the roadside field sobriety tests [to Mr. Clute] . . . ." (App.4). In making such a determination, the Court of Appeals completely ignored the facts and circumstances of Mr. Clute's arrest and interrogation.

Undisputedly, the officer **fully and completely believed Mr. Clute was driving while intoxicated** prior to making the traffic stop. (App.20-23). When the officer stopped Mr. Clute, he **intended** to arrest Mr. Clute for DUI. (App.20-23). Only after this stop did Mr. Clute allegedly made his self-incriminating statements. (App.20-23). Under the circumstances, Mr. Clute's statement should have been excluded. See Miranda, 384 U.S. 436.

The officer's "traffic stop" herein was anything but routine as he was predisposed to

arrest Mr. Clute for DUI (App.20-22), notwithstanding anything Mr. Clute may have done or said after the stop. (App.22-23). Once the officer decided to make the traffic stop, **Mr. Clute was going to jail**. (App.23).

Moreover, after the stop, Mr. Clute was in the officer's custody and control (App.20-22), and, notwithstanding any other fact, he was going to be arrested for DUI. (App.22). The officer was clearly predisposed to arrest Mr. Clute for DUI regardless of what transpired during or after the traffic stop. (App.20-22). This included the results of the field sobriety tests, the officer's personal observations of Mr. Clute, or any other mitigating factors available to the officer.

Under these circumstances Mr. Clute was, for all practical purposes, completely and totally under arrest for DUI from the moment the officer pulled him over. Any statements he made subsequent to being pulled over, absent Miranda warnings had to have been suppressed.

The South Carolina Court of Appeals improperly found Mr. Clute was not under arrest when he made the incriminating statements. The evidence demonstrated to the contrary. This

when he made the incriminating statements. The evidence demonstrated to the contrary. This Court should grant Mr. Clute's Petition for Writ of Certiorari to order reverse the judgment and remand this case.

CONCLUSION

Based upon the foregoing arguments and citation of authority, the Petitioner, Randy Ray Clute, respectfully requests this Supreme Court to grant him a Writ of Certiorari and review the opinion of the South Carolina Court of Appeals, as well as that of the South Carolina Supreme Court.

Respectfully submitted:

YOUNG, CLEMENT, RIVERS & TISDALE, L.L.P.

By: _____

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August _____, 1997

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

The State, ... Respondent.

v.

Randy Ray Clute, ... Appellant.

Appeal From Georgetown County
David H. Maring, Sr.,
Circuit Court Judge

Opinion No. 2588

Heard October 8, 1996
Filed November 4, 1996

AFFIRMED

Stephen P. Groves, Sr., of Charleston; and Reese Joye and John L. Drennan, both of North Charleston, for appellant.

Attorney General Charles Molony Condon, Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General G. Robert DeLoach, III, all of Columbia; and Solicitor Ralph J. Wilson, of Conway, for respondent.

CURETON, J.: Randy Ray Clute was convicted of driving under the influence, second offense. The circuit court ordered him to pay a $3,000 fine and sentenced him to one year imprisonment, suspended upon payment of the fine plus costs, four years probation, and thirty days public service. Clute appeals. We affirm.

Facts

On April 23, 1994, Officer Hess of the Georgetown Police Department stopped Clute's vehicle after observing Clute driving erratically. Hess testified that when he approached the vehicle, he noticed a strong odor of alcohol and Clute immediately stated, "I, I know I had too much." Prior to arresting Clute and without reading him his Miranda rights, Hess had Clute perform a series of field sobriety tests. According to Hess, Clute failed the sobriety tests, including the horizontal gaze nystagmus test (HGN). Further, Clute's eyes appeared glassy and there was a strong odor of alcohol about his person. Hess arrested Clute for driving under the influence and transported him to the police department. At the station, Hess videotaped Clute performing the field sobriety tests again. Clute refused to take the breathalyzer test.

At a pretrial hearing, Clute moved to suppress any statements he made during the stop and field sobriety tests on the ground he was subjected to custodial interrogation without being read the Miranda warnings. The trial court denied the motion. At trial, the State sought to prove Clute had a previous out of state conviction for driving under the influence through a copy of Clute's South Carolina driving record and a notice of suspension from the South Carolina Highway Department. Clute argued this evidence was not sufficient to prove a previous conviction under S.C. Code Ann. § 56-5-2980 (1991). The trial court found the driving records admissible over Clute's objection. Clute moved to preclude Hess from testifying as an expert witness concerning the HGN test. The trial court denied the motion and qualified the officer as an expert witness. Clute also moved to suppress the videotape Hess made of him performing field sobriety tests while at the police station. The judge admitted the videotape over Clute's objection.

Discussion

I.

On appeal, Clute argues the trial court should have found he was subjected to custodial

interrogation during the administration of the field sobriety tests and should therefore have been apprised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). He further argues that because he was not apprised of these rights, the trial court should have found that any statements he made during the administration of the tests were inadmissible. We disagree.

In Pennsylvania v. Bruder, 488 U.S. 9 (1988), the United States Supreme Court held that a motorist is not in custody during the performance of field sobriety tests, and is therefore not entitled to a recitation of constitutional rights prior to the tests. Furthermore, the Court found that a motorist's response to questions about his drinking are admissible despite the lack of Miranda warnings. Id. at 10. Likewise, in State v. Peele, 298 S.C. 63, 378 S.E.2d 254 (1989), the South Carolina Supreme Court held that a roadside field sobriety test did not constitute detainment sufficient to rise to the level of custodial interrogation. Id.

Because we find nothing extraordinary about the circumstances surrounding the administration of the roadside field sobriety tests in this case, we hold the trial court properly found

Clute was not "in custody" for purposes of Miranda during the administration of the sobriety tests.

II.

Clute also argues the trial court erred in failing to make a specific finding as to whether the statements he made during the traffic stop were voluntary. In support of this contention, Clute cites several cases setting forth the proposition that a defendant need not establish custody in order to be entitled to a hearing on the issue of voluntariness pursuant to Jackson v. Denno, 378 U.S. 368 (1964). See State v. Silver, 314 S.C. 483, 431 S.E.2d 250 (1993); State v. Creech, 314 S.C. 76, 441 S.E.2d 635 (Ct.App. 1994). Initially, we note Clute makes no argument on appeal that the trial court denied his motion for a Jackson v. Denno hearing. Moreover, the argument Clute presents on appeal is not the precise argument he made at trial. Although Clute referred the trial court to, among others, the holdings of State v. Silver and State v. Creech, he mentioned the cases only in relation to his argument that he was "in custody" at the time of the statements for purposes of Miranda. Cf. State v. Silver, 314 S.C. 483, 431 S.E.2d 250 (1993), aff'g as modified 307 S.C.

326, 414 S.E.2d 813 (Ct.App. 1992) (holding it was error to consider defendant's voluntariness argument on appeal as a Jackson v. Denno situation where defendant moved for an in camera hearing at trial on the issue of custody and whether he had received Miranda warnings rather than on the issue of voluntariness). Moreover, after the trial court ruled that Clute was not in custody for purposes of Miranda, Clute failed to request a specific ruling as to the voluntariness issue pursuant to Jackson v. Denno. The issue is therefore not preserved for appeal. See State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974) (in order to preserve an error for appeal, a defendant must object and ask for a ruling); State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969) (objection must be on specific ground); see also State v. Hudgins, ___ S.C. ___, 460 S.E.2d 388(1995) (a party cannot argue one ground below then argue another on appeal); State v. Silver, 314 S.C. 483, 431 S.E.2d 250 (ground asserted on appeal must be supported by objection raised at trial).

III.

Clute further argues the trial court erred in ruling that it was harmless error to introduce the videotaped field sobriety tests taken after

he was in police custody because no Miranda warnings were given prior to the videotaping. Clute argues the videotaped statements of him reciting the alphabet were highly prejudicial and their impact on the jury was great enough to warrant a mistrial. We disagree.

In determining whether an error is harmless, the test is whether there is a reasonable probability that the statements contributed to the defendant's conviction of the crime, or if the defendant's statements were merely cumulative. State v. Bernotas, 277 S.C. 106, 283 S.E.2d 580 (1981). Where challenged evidence does not prejudice the defendant because it was merely cumulative to independent and overwhelming evidence of guilt the court will not set aside the conviction. State v. Newell, 303 S.C. 471, 401 S.E.2d 420 (Ct.App. 1991). Even an error of constitutional magnitude may be harmless if, considering the entire record on appeal, the reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict. Chapman v. California, 386 U.S. 18 (1967).

The State concedes the audio portion of the videotaped field sobriety tests wherein Clute recites the alphabet was improperly admitted over Clute's objection. See Pennsylvania v. Muniz,

496 U.S. 582, 604 n.17 (1990) (holding that drunk driving suspect's counting at officer's request during the field sobriety tests conducted while suspect was in custody qualified as a response to "custodial interrogation" within the meaning of Miranda. However, the court did not determine whether the verbal response was "testimonial" in nature). Nevertheless, we agree with the trial court the error was harmless in light of the other evidence of Clute's guilt. The videotaped evidence is cumulative to Officer Hess's properly admitted testimony regarding Clute's inability to recite the alphabet. Officer Hess's testimony as to Clute's performance on the other field sobriety tests was also properly admitted. Furthermore, having viewed the videotape, we agree with the trial court that the physical, nontestimonial evidence on the videotape outweighs any prejudice from the recitation of the alphabet inasmuch as Clute is visibly intoxicated on the videotape. See Pennsylvania v. Muniz, 496 U.S. 582 (Fifth Amendment privilege against self-incrimination protects accused from being compelled to give evidence of testimonial or cumulative nature but not from being compelled to produce real or physical evidence).

IV.

Clute further argues the trial court erred in not granting a mistrial based on the introduction of his South Carolina driving record for the purpose of proving a prior DUI conviction. Specifically, Clute argues the driving record should have been excluded because it constitutes improper character evidence. This issue is not preserved for appeal.

At trial and out of the presence of the jury, Clute refused to concede he had a prior conviction for driving under the influence. Thus, the State sought to introduce Clute's South Carolina driving record as proof of a prior DUI conviction in another state. Clute objected to the introduction of his South Carolina driving record, arguing that the State had to introduce the actual conviction records rather than the driving record to prove a previous DUI. The trial court ruled the driving record was admissible. Clute did not raise an objection pursuant to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), when the State placed his driving record into evidence, but merely renewed the objection he had made out of the presence of the jury. At the close of all evidence, Clute made a motion for a mistrial on the ground the evidence

of the previous conviction should not have been admitted, arguing it was unnecessary to prove the prior conviction for the circuit court to gain jurisdiction and the evidence should only have been used during the sentencing phase of the trial. Clute further argued the only reason the State would introduce the evidence would be to prejudice the jury.

An objection to evidence must be contemporaneous and must be upon a specified ground. State v. Crowley, 226 S.C. 472, 85 S.E.2d 714 (1955). Here, Clute waited until the close of both the State and defense cases to move for a mistrial on the ground the evidence of the prior conviction was improper character evidence. The failure to make a proper contemporaneous objection to the admission of evidence "cannot be later bootstrapped by a motion for a mistrial." State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 189 (1981). This issue is, therefore, not properly before us for review.

V.

Clute next contends the State failed to offer sufficient proof of his prior DUI conviction under S.C. Code Ann. §§ 56-5-2970 and 56-5-2980 (1991). We disagree.

South Carolina Code Ann. § 56-5-2970 requires public officers to report DUI convictions to the Department of Public Safety on a form provided by the Department. Section 56-5-2980 provides that these reports constitute "prima facie evidence of the information contained on such reports." Given its plain and ordinary construction, the term "prima facie evidence"

> denotes evidence which, if unexplained or uncontradicted, is sufficient in a jury case to carry the case (the jury, and to sustain a verdict in favor of the issue which it supports, but which may be contradicted by other evidence.

McKenzie v. Standard Accident Ins. Co., 198 S.C. 109, 117, 116 S.E.2d 529, 532 (1941).

In our view, although §§ 56-5-2970 and 56-5-2980 provide that dispositional records establish a prima facie case, there is nothing in the statutes to prevent the State from introducing other evidence to prove a prior conviction. As such, we find no error in the trial court's submission of the issue to the jury.

VI.

Clute also argues the trial court erred in its reasonable doubt charge to he jury. We disagree.

The trial court instructed the jury on reasonable doubt, stating in pertinent part:

> Now, what is a reasonable doubt? A reasonable doubt is the kind of doubt which would cause a reasonable person to hesitate to act. It is a doubt for which a reason can be given.

An instruction on reasonable doubt is defective if a reasonable juror could interpret it to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause. State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991). In Manning, the court proposed a model instruction defining reasonable doubt as "the kind of doubt that would cause a reasonable person to hesitate to act." Id. at 417, 409 S.E.2d at 375. However, the Manning definition is merely a model and trial courts are not required to charge only that definition. State v. Longworth, 31 3 S.C. 360, 438 S.E.2d 219 (1993). The charge in this case does not contain the precise language found to be objectionable in Manning. (i.e., reference to "moral or grave

certainty" or "real reason"), although the trial court did advise the jury that reasonable doubt is a "doubt for which you can give a reason." See State v. Whipple, Op. No. 24458 (S.C.Sup.Ct. filed July 1, 1996)(Davis Adv. Sh. No.17 at 21) (upholding a reasonable doubt charge where trial court repeatedly stated that a reasonable doubt was a doubt for which you could give a reason); State v. Kirkpatrick, __ S.C. __, 462 S.E.2d 884 (1995) (upholding a trial court's charge to the jury that a reasonable doubt is "one for which you could give a reason"); State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) (upholding a reasonable doubt charge where appellant complained the trial court repeatedly told the jury a reasonable doubt is one for which you can give a reason, finding the charge lacked the offending language in Manning). Viewing the reasonable doubt charge as a whole, we find no reversible error given the court's use of the suggested language in Manning that a reasonable doubt is "the kind of doubt that would cause a reasonable person to hesitate to act." See State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980)(a jury charge which is substantially correct and covers the law does not require reversal).

VII.

Clute asserts the trial court erred in admitting evidence of the HGN test and in allowing the arresting officer to testify as an expert witness. Specifically, he claims the arresting officer should not have been qualified as an expert because he had not completed twenty hours of training in administering the HGN test and because he administered the HGN test improperly. Clute cites State v. Sullivan, 310 S.C. 311, 426 S.E.2d 766 (1993), in support of these arguments. His reliance thereon is misplaced.

In Sullivan, the Court held that HGN test results were admissible where the arresting officer had approximately twenty hours of training in administering the test. However, the Court did not establish twenty hours as a threshold requirement for an officer to qualify as an expert in administering the test. Generally, the qualification of an expert witness is within the discretion of the trial court. State v. McFadden, __ S.C. __, 458 S.E.2d 61 (Ct. App. 1995). Defects in the amount and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not its admissibility. The party presenting the

expert must show that the witness possesses, either through study or experience, specialized knowledge that makes him better qualified than the jury to form an opinion on a particular subject. State v. Harris, __ S.C. __, 456 S.E.2d 433 (Ct. App. 1995). In this case, the officer who administered the HGN test had completed 16 hours of training to administer the test. In view of the applicable case law, we can discern no abuse of discretion in the trial court's qualification of the administering officer as an expert in this case.

We also disagree with Clute's argument that the arresting officer in this case should not have been qualified as an expert because he did not administer the HGN test as described in State v. Sullivan, 310 S.C. 311,426 S.E.2d 766. Clute correctly notes that in a footnote, the Sullivan Court describes the HGN test as follows:

> Nystagmus is described as an involuntary jerking of the eyeball, a condition that may be aggravated by the effect of chemical depressants on the central nervous system. The HGN test consists of the driver being asked to cover one eye and focus the other on an object held at the

> driver's eye level by the officer. As the officer moves the object gradually out of the driver's field of vision toward his ear, he watches the driver's eyeball to detect involuntary jerking.

Sullivan, 310 S.C. at 311 n.2, 426 S.E.2d at 766 n.2 (citations omitted). However, the Court did not establish its description of the test as the sole means of properly administering the test. Indeed, we question the precedential value of the description inasmuch as it appears only in a footnote and the Court made no comment as to its view of the correctness of the procedure. In any event, the arresting officer in this case testified that he was trained to administer the test without covering one of the suspect's eyes. Moreover, it is clear from the record that the officer did not base his decision to arrest Clute solely on the results of the HGN test; rather, the officer found the HGN test results inconclusive and administered two additional sobriety tests. This procedure is in accordance with the mandates set forth in Sullivan regarding the admissibility of HGN test results.[1]

---

[1]

For the foregoing reasons the conviction is **AFFIRMED.**

HEARN and ANDERSON, JJ., concur.

[FOOTNOTE No. 1]: In Sullivan, the Court held that evidence from the HGN test, as from other field sobriety tests, is admissible "when used to elicit objective manifestations of soberness or insobriety." 310 S.C. at 315, 426 S.E.2d at 769. The Court stated:

> We hold that evidence arising from HGN tests is not conclusive proof of DUI. A positive HGN test result is to be regarded as merely circumstantial evidence of DUI. Furthermore, HGN tests shall not constitute evidence to establish a specific degree of blood alcohol content. (Citations omitted).
>
> We hold that testimony relating to the HGN test was admissible in the present case because the HGN test was used in conjunction with other field sobriety tests to establish evidence of DUI.

Id. at 315-16, 426 S.E.2d at 769.

CLYDE N. DAVIS, JR.
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

May 27, 1997

Stephen P. Groves, Esquire
Stephen L. Brown, Esquire
Young Clement Rivers & Tisdale
P O Box 993
Charleston, SC 29402

Re: State v. Clute, Randy Ray

Dear Counsel:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari denied.

s/ Ernest A. Finney, Jr. C.J.
For the Court

May 27, 1997."

By Copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,
CLERK

THE SOUTH CAROLINA COURT OF APPEALS

Kenneth A. Richstad, Clerk
Ida R. Carson, Deputy Clerk
Ida R. Carson, Deputy Clerk

Post Office Box 11629
Columbia, S.C. 29211
(803) 734-1890

December 31, 1996

Stephen P. Groves, Esquire
P.O. Box 993
Charleston, South Carolina 29402-0993

Re: The State v. Randy Ray Clute

Dear Mr. Groves:

Your Petition for Rehearing has been denied in the following Order:

"Petition for Rehearing Denied.

s/Jasper M. Cureton, J.
s/Kaye G. Hearn, J.
s/Ralph King Anders, Jr., J.

Columbia, South Carolina
December 31, 1996."

The Remittitur will be held for a period of thirty days until the time to Petition for Writ of Certiorari has expired, after which it will be forwarded to the trial court.

Sincerely,
Kenneth A Richstad
Clerk

DIRECT EXAMINATION OF OFFICER HESS

. . . ABC'S. I done a horizontal gaze nystagmus test on him at which point he failed that in my opinion. I had him stand a one-legged stand at which point he was staggering. He couldn't hold his balance at which point I. at that point in time I placed him under arrest for driving while under the influence.

Q. Did he ever say anything else to you?

A. Not to my recollection. other than the fact of initially when I went up to the vehicle. he said that he knew that he had too much.

Q. And that came at what point in time. please?

A. Just as I was approaching the vehicle--

Q. Thank you. Answer any questions---

A. ---right after I stopped him.

Q. Answer any questions Mr. Joye has. please.

CROSS-EXAMINATION [OF OFFICER HESS] BY MR. JOYE:

Q. Mr. Hess, at the time that you put the blue light on, that was on this side of the bridge. Isn't that correct, sir?

A. Yes, sir.

Q. All right, sir, and at the time that you put the blue light on, your purpose in putting the blue light on was because you felt that he was under the influence of alcohol or something at that time. Isn't that correct?

A. Yes, sir.

THE COURT: What's your objection?

MR. HILLIARD: That's a legal conclusion, Your honor.

THE COURT: Well, I, I agree with that.

MR. HILLIARD: Thank Your Honor.

CROSS-EXAMINATION [OF OFFICER HESS] RESUMED BY MR. JOYE:

Q. Sir, at that point in time you had the blue light on. Was he under your authority? "So he was under your authority?"

A. The answer that I gave back then is, "Correct," and, yes.
Q. He was under your authority at that time?
A. Yes, sir.
Q. All right, and was he free to leave at that moment whenever he handed you his driver's license and registration?
A. No, he wasn't.
Q. All right, sir, and whenever you asked him the question, had he had anything to drink, what did he respond to you?
A. At that point I stated to you at that point in time I didn't recall.
Q. I see. Okay. Now, sir, whenever you wrote your incident report -- this is a two-page document that you furnished to the prosecutor -- whenever you wrote this point in time, after you smelled the strong odor of alcohol, and you were investigating his driving, that there wasn't anything, and I repeat, anything, that Mr. Clute

could have done to convince you that he was not under the influence?

A. Do you want to repeat that again because I'm not understanding what you're saying?

Q. And isn't it true, Mr. Hess, that after you smelled the strong odor of alcohol, and you were investigating the driving, that there wasn't anything, there wasn't anything, that Mr. Clute could have done to convince you that he was not under the influence?

A. At that point in time I felt that I had probable cause to arrest him for --

Q. Driving under the influence?

A. That is correct.

Q. And that's before you asked him to give evidence that you could gather to use against him in a court of law?

A. That is correct.

Q. Thank you.

MR. HILLIARD: Nothing else. You can come down.

MR. JOYE: Your Honor, sometimes in, in the court procedures, sometimes I forget that we have a jury in the back room, and you, and, and I just wanted to call your [. . . .]

* * * * *

DIRECT EXAMINATION [OF MR. CLUTE] RESUMED BY MR. JOYE [JACKSON V. DENNO HEARING]:

Q. All right, and whenever Mr. Hess walked up there to your vehicle, did he have the blue light on?

A. Yes, sir.

Q. And did you obey the blue light by stopping?

A. Yes, sir.

Q. Sir, did you know that you had a right to remain silent, that you had a right not to say or do anything?

A. Not at the time, sir, no.

Q. All right, sir. Did you feel that you were under his authority at that time?

A. Yes, I did.

Q. Did you believe that you were free to leave?

A. No.

Q. And, sir, when he asked you to say something or to do something, why did you do it?

A. I thought that I had to do what the officer told me to do.

Q. All right, sir. If you had known that you had a right not to say or do anything to incriminate yourself, would you have done so?

A. No, sir. If I had known or been told that I didn't have to do the tests, I wouldn't have done them.

Q. Thank you. Answer any questions the solicitor may have relating to this subject.

SOUTH CAROLINA DEPARTMENT
OF HIGHWAYS AND PUBLIC
TRANSPORTATION
DIVISION OF MOTOR VEHICLES
P.O. BOX 1498
COLUMBIA, S.C. 29216-0028

CERTIFICATION FOR COURT
05/05/1994

NAME: CLUTE, RANDY RAY
DRIVER LICENSE NO.: 004053928
ADD: 2705 RION ST GEORGETOWN, SC 29440
0000COUNTY GEOR[GETOWN]
HT: 5 08, WGT: 230, SEX: M
DRV TRAIN: YES BORN: 12/12/1957
REG DL CLASS D ISSUED 09/22/1992
EXPIRES 12/12/1996
REG BP CLASS ISSUED 00/00/0000
EXPIRES 00/00/0000
CDL DL CLASS ISSUED 00/00/0000
EXPIRES 00/00/0000
CDL BP CLASS ISSUED 00/00/0000
EXPIRES 00/00/0000
G DL: POINTS - NO SUSPENSION
MANDATORY-CLEARED MANUAL - NO SUSPENSION
L DL: NO DISQUALIFICATION
VIOL 499 - DRIVING UNDER INFLUENCE
DATE 04/27/1991 CONV 05/28/1991

27

RECD 02/06/1992 POINTS 0

POST 02/10/1992 TKT 2849526

CONV STATE-LA; COMRCL VEH - NO; HAZMAT NO

SUSP 001 - DRIVING UNDER INFLUENCE

CAUSE 04/27/1991 BEG 03/02/1992

END 09/02/1992 PROVISIONAL

POST: 02/18/1992

REINSTATED: 09/22/1992

END INQUIRY

DRIVING UNDER INFLUENCE = 1

DRIVING UNDER SUSPENSION = 0

SOUTH CAROLINA

DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION

DIVISION OF MOTOR VEHICLES

P.O. BOX 1498

COLUMBIA, S.C. 29216-0028

CL 0000000C04053928

CLUTE, RANDY RAY 02/18/1992 REF 001

2705 RION ST 4053928 M,12/12/1957

GEORGETOWN,SC 294400000 CL CLASS D

OFFICIAL ORDER OF SUSPENSION

YOU ARE HEREBY OFFICIALLY NOTIFIED THAT YOUR PRIVILEGE TO OPERATE A MOTOR VEHICLE IN THIS STATE IS SUSPENDED FOR VIOLATION OF SECTION 56-3-2990, CODE OF SOUTH CAROLINA LAWS, 1976, AS AMENDED - DRIVING UNDER THE INFLUENCE OF INTOXICANTS.

PERIOD OF SUSPENSION

BEGINNING	12.01 A.M. 03/02/1991
ENDING	12.00 MIDNIGHT 9/02/1992
VIOLATION	DRIVING UNDER INFLUENCE
VIO-DATE	04/27/1991 CCHV-
DATE	05/28/1991
TICKET	2849526

MANAGER DRIVER RECORDS

IMPORTANT

UNDER NO CIRCUMSTANCES CAN A PROVISIONAL LICENSE BE ISSUED UNTIL THE DRIVER RECORDS OFFICE. POST OFFICE BOX 1498. COLUMBIA. S.C. 29216-0028 HAS RECEIVED THE FOLLOWING: (1) NOTIFICATION OF YOUR ENROLLMENT IN AN ADSAP PROGRAM; (2) PROOF OF FINANCIAL RESPONSIBILITY FOR THE FUTURE. IF THIS PROOF. WHICH MUST BE MAINTAINED FOR A PERIOD OF NOT LESS THAN THREE YEARS FROM THE ENDING DATE OF THE SUSPENSION PERIOD. IS IN THE FORM OF LIABILITY INSURANCE. A CERTIFICATE OF INSURANCE. FORM 32-22. MUST BE FILED IN YOUR BEHALF BY AN INSURANCE COMPANY.

AFTER THE SUSPENSION PERIOD HAS ELAPSED. THE DRIVER RECORDS OFFICE MUST ALSO RECEIVE: (1) NOTIFICATION OF COMPLETION OF AN ADSAP PROGRAM; (2) THE REQUIRED REINSTATEMENT FEE OF $30.00 FOR EACH SUSPENSION BEFORE A LETTER OF AUTHORIZATION FOR REEXAMINATION WILL BE FORWARDED TO YOU. YOU MAY NOT DRIVE UNTIL YOU HAVE SUCCESSFULLY COMPLETED THE DRIVER REEXAMINATION.

FILED
OCT 14 1997
CLERK

No. 97-491

In The
Supreme Court of the United States
October Term, 1996

RANDY RAY CLUTE, ... *Petitioner*,
vs.
STATE OF SOUTH CAROLINA, ... *Respondent*.

On Petition for Writ of Certiorari
To the South Carolina Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

1. Does a court with original jurisdiction over a criminal offense violate a defendant's rights to a fair trial when the court permits the prosecution to introduce evidence of the defendant's prior conviction of a similar offense?

2. Whether a court, under *Jackson v. Denno*, must conduct a hearing on "voluntariness" and another separate hearing on "custody," when "custody" is just one of the factors a court reviews when determining "voluntariness?"

3. Does a court's admission of a videotape, including the audio portions, violate a defendant's rights against self-incrimination, when the videotape contains the defendant's non-*Mirandized* admissions?

4. Is a law enforcement officer required to give a defendant his *Miranda* warnings when the defendant is within the officer's care, custody and control?

RESPONDENT'S COUNTER-QUESTIONS PRESENTED

1. Does this Court lack jurisdiction to review the claim that the admission of the Petitioner's driving record improperly attacked his character, where the failure to timely raise this objection constituted a procedural default under state law?

2. Does this Court lack jurisdiction to review the Petitioner's claim that the trial court did not determine the voluntariness of his statement, where his failure to obtain a ruling constituted a procedural default under state law?

3. Was the admission of the audio portion of a videotape of the Petitioner's field sobriety test harmless error, where the overwhelming evidence supported the verdict and he is visibly intoxicated on the tape?

4. Did the lower court correctly rule that the Petitioner was not "in custody" when he performed several field sobriety tests during a routine traffic stop?

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No. 97-491

In The
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RANDY RAY CLUTE, ... *Petitioner*,
vs.
STATE OF SOUTH CAROLINA, ... *Respondent*.

On Petition for Writ of Certiorari
To the South Carolina Court of Appeals

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

The Respondent, State of South Carolina, submits that this Court should deny and dismiss the petition to review the judgment of the South Carolina Court of Appeals.

CITATION TO OPINION BELOW

The South Carolina Court of Appeals opinion dated October 8, 1996 is reported at ___ S.C. ___, 480 S.E.2d 85 (Ct. App. 1996), and is reproduced in PETITIONER'S APPENDIX ("PET. APP.") p. 1. On December 31, 1996, the Court of Appeals denied rehearing in an unpublished order. PET. APP. p. 19. The South Carolina Supreme Court denied

the petition for writ of certiorari on May 27, 1997 in an unpublished order. PET. APP. p. 18.

JURISDICTION

The Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following:

1) The Fifth Amendment to the United States Constitution, which states in pertinent part:

> No person... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law....

2) The Fourteenth Amendment to the United States Constitution, which states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

3) S.C. CODE ANN. § 22-3-540 (1989), which states in pertinent part:

> Magistrates shall have exclusive jurisdiction of all criminal cases in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days....

4) S.C. CODE ANN. § 56-5-2930 (1991), which states in pertinent part:

> It is unlawful for any person... who is under the influence of intoxicating liquors,... to drive any vehicle within this State.

5) S.C. CODE ANN. § 56-5-2940(1) (1991), which states in pertinent part:

> A person violating a provision of Section 56-5-2930, upon conviction,... must be punished in accordance with the following:... By a fine of two hundred dollars or imprisonment for not less than forty-eight hours nor more than thirty days, for the first offense.

COUNTER-STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On December 6, 1994, the State of South Carolina tried the Petitioner in the Georgetown County Court of General Sessions for second offense driving under the influence ("DUI"). On December 7, the jury found the Petitioner guilty as charged. The Honorable David H. Maring, Sr. sentenced the Petitioner to imprisonment for one year and a $3,000.00 fine, suspended upon ten days service time, the fine, and four years of probation.

The Petitioner appealed his conviction. Following briefing and oral argument, the South Carolina Court of Appeals affirmed the conviction on October 8, 1996. The Court of Appeals denied rehearing in an unpublished order dated December 31, 1996. The South Carolina Supreme Court denied its writ of certiorari in an unpublished order dated May 27, 1997.

B. STATEMENT OF RELEVANT FACTS

For the purpose of this *Brief in Opposition*, the Respondent incorporates the recitation of relevant facts from the opinion below. *See* PET. APP. p. 2.

HOW THE QUESTIONS WERE RAISED BELOW

A. PETITIONER'S OBJECTION TO THE ADMISSION OF HIS DRIVING RECORD.

Before trial, the Petitioner moved to dismiss the DUI charge because the State could not prove it was a second offense. The State responded that it would introduce a certified copy of the Petitioner's driving record to prove the second offense. The Petitioner then argued that state law required a certified copy of his actual conviction to prove the offense. Judge Maring denied this motion. When the State introduced the record in its case in chief, the Petitioner renewed his objection "as previously noted." RESPONDENT'S

APPENDIX ["RESP. APP."] at 210-480. After the State and defense rested, the Petitioner moved for a mistrial on the ground that the introduction of his driving record impermissibly placed his character in evidence. Judge Maring denied the mistrial. RESP. APP. at 490-580.

The Court of Appeals later ruled that the objection to the alleged character evidence was untimely and could not be "bootstrapped" to a mistrial motion. PET. APP. pp. 9-10. The South Carolina Supreme Court declined to review this holding on petition for writ of certiorari.

B. PETITIONER'S OBJECTION TO TESTIMONY ABOUT THE ROADSIDE FIELD SOBRIETY TESTS.

Before trial, the Petitioner moved to suppress the results of his roadside field sobriety tests. The Petitioner argued that since he was "in custody," Corporal Hess could not require him to perform the field sobriety tests without administering the *Miranda*[1] warnings. RESP. APP. at 100-200. Judge Maring rejected this argument as follows:

> I said he is not entitled to *Miranda* warnings unless he's under arrest, in custody. I don't know that there's much difference between being in custody and being under arrest, other than a warrant hasn't been signed. All right.

---

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

The Court's ruling is then he is not in custody for your purposes for appeal. (Emphasis added). RESP. APP. at 190.

The Petitioner did not ask for further clarification of this ruling. On appeal, the Petitioner challenged the ruling on the custody issue, and questioned Judge Maring's failure to decide the voluntariness of the statement. The Court of Appeals ruled that the Petitioner was not in custody during the field sobriety tests. The Court of Appeals also held that the Petitioner waived any challenge to the voluntariness of his statements because he did not obtain a specific ruling on the issue at trial. PET. APP. pp. 3-6. The South Carolina Supreme Court declined to review these holdings on writ of certiorari.

C. PETITIONER'S OBJECTION TO THE VIDEOTAPE OF THE FIELD SOBRIETY TESTS.

Judge Maring admitted the videotape of the field sobriety test over defense objections. Following the verdict, Judge Maring found that the admission of the audio portion of the tape was harmless error. On direct review, the Court of Appeals agreed that the Petitioner was in custody and did not receive his *Miranda* warnings when the field sobriety tests were taped. Therefore, the sound portion of the tape was inadmissible. The lower court further held that the

error was harmless in the context of the record and the Petitioner's obvious intoxication on the tape. PET. APP. pp. 6-8. The South Carolina Supreme Court declined to review this holding on writ of certiorari.

REASONS FOR DENYING THE WRIT

A. The failure to timely object to the introduction of the driving record as alleged improper character evidence is an adequate and independent state law ground for denying certiorari review.

The Petitioner argues that it was unnecessary for the State to prove jurisdiction of the second offense DUI charge because the trial court had concurrent jurisdiction under *State v. Leonard*, 287 S.C. 462, 339 S.E.2d 159 (Ct. App. 1986), *rev'd on other grounds* 292 S.C. 133 (1987).[2] The Petitioner asserts that the State used jurisdiction as a subterfuge "to get the prior conviction before the jury to

[2]South Carolina magistrates have exclusive jurisdiction over crimes "in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days." S.C. Code Ann. § 22-3-540 (1989). First offense DUI carries a maximum fine of $200.00 and thirty days imprisonment. *See* S.C. CODE ANN. § 56-5-2940(1) (1991).

demonstrate he was a bad person and guilty of the pending charge." (Emphasis in original). PETITION ["PET."] pp. 8-14. The Petitioner wholly ignores his role in bringing the matter before the jury.

As the Court of Appeals noted, the Petitioner challenged the trial court's jurisdiction from the outset, and required proof that he committed a second offense.[3] The Petitioner first objected to the alleged character evidence after the State and the defense rested. Therefore, the Court of Appeals concluded that the objection was untimely under state error preservation rules. PET. APP. pp. 9-10.

South Carolina does not recognize a "plain error" rule. *State v. Hudgins*, 319 S.C. 233, 460 S.E.2d 388 (1995). Under state law, the defendant must contemporaneously object on specific grounds in order to

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[3]Under state law, an indictment for DUI second offense must allege the previous offense because the prior conviction is a substantive element of the offense. *State v. Mitchell*, 220 S.C. 433, 68 S.E.2d 350 (1951). If jurisdiction is disputed and the parties do not stipulate to the General Sessions Court's power to hear the case, the State may introduce the previous conviction with appropriate limiting instructions. *See State v. Anderson*, 318 S.C. 395, 458 S.E.2d 56 (Ct. App. 1995). In this case, the Petitioner challenged the trial court's jurisdiction, but did not timely raise his character evidence objection or request limiting instructions on the use of his prior conviction.

preserve an exception for appeal. *Id.*, 319 S.C. at 236-37, 460 S.E.2d at 390-91. Furthermore, a defendant cannot cure his failure to make a timely objection to the admission of evidence by a later motion for a mistrial. *State v. Lynn*, 277 S.C. 222, 284 S.E.2d 786 (1981).

This Court lacks jurisdiction to review alleged violations of federal law by a state court where an adequate and independent state law ground supports the judgment below. *Michigan v. Long*, 463 U.S. 1032 (1983); *Coleman v. Thompson*, 501 U.S. 722 (1991). This rule applies regardless of whether the state law ground is procedural or substantive. *Coleman v. Thompson*, 501 U.S. at 729. Conversely, this Court will not review constitutional issues which the state court refused to consider because the defendant did not comply with state error preservation rules. *Id.*, 501 U.S. at 729-30; *Wainwright v. Sykes*, 433 U.S. 72 (1977). Therefore, since the lower court expressly relied upon the Petitioner's procedural default in refusing to consider his constitutional claims, this Court should not grant certiorari review of this issue. *Michigan v. Long*, *Id.*

B. The failure to obtain a ruling on the voluntariness of the Petitioner's statements from the field sobriety test is an adequate and independent

state law ground for denying certiorari review.

The Court of Appeals did not consider the Petitioner's argument that his statements during the traffic stop were involuntary because he only requested a ruling on the custody issue. PET. APP. pp. 5-6. Under state error preservation rules, a defendant must both object **and** obtain a ruling from the judge. *State v. Pierce*, 263 S.C. 23, 207 S.E.2d 414 (1974). Accordingly, if the trial court finds that a defendant was not "in custody" for *Miranda* purposes, the defendant must also obtain a ruling on the voluntariness of a statement to preserve the issue on appeal. *State v. Silver*, 314 S.C. 483, 431 S.E.2d 250 (1993).

The Petitioner now insists that the Court of Appeals applied an incorrect standard in rejecting his Fifth Amendment claim. The Petitioner asserts that the Court of Appeals improperly "created a **two (2) step** procedure for *Jackson v. Denno*[, 378 U.S. 368 (1964)] hearings <u>not</u> heretofore previously required by either this Court or the South Carolina appellate courts." (Emphasis in original). PET. p. 17. This argument has no merit, and does not warrant certiorari review by this Court.

Upon timely objection to the admission of a statement, the trial court must determine whether the statement was voluntary by a preponderance of the evidence.

Jackson v. Denno, *Id.*; *Lego v. Twomey*, 404 U.S. 477 (1972). The voluntariness of a statement depends on the totality of the circumstances of its making. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

As the Petitioner acknowledges, custody is simply one factor in determining whether a statement was made voluntarily. PET. p. 16. However, the ultimate question in a *Jackson v. Denno* hearing is whether the statement was coerced. *Lego v. Twomey*, 404 U.S. at 485, n. 12. "The failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised." *Oregon v. Elstad*, 470 U.S. 298, 310 (1985). Accordingly, a trial judge's ruling that a defendant was not "in custody" does not implicitly raise or resolve the voluntariness of the statement. *See Withrow v. Williams*, 507 U.S. 680, 695-96 (1993) [District court should not have reached voluntariness issue on federal habeas review, where petitioner only argued custodial nature of statement below].

The Court of Appeals correctly recognized that the Petitioner only argued the custodial nature of his statements to the trial judge. After Judge Maring ruled against the

Petitioner, **nothing** prevented him from seeking or obtaining a ruling on the voluntariness of the statements.[4] *See* RESP. APP. at 190.

Since the Petitioner did not obtain a ruling on this issue, he did not preserve his voluntariness argument for appellate review. The South Carolina Court of Appeals simply applied established state rules of error preservation in its decision; it did not create an "additional step" in resolving *Jackson v. Denno* issues.[5] Therefore, since the Petitioner's procedural default is an adequate and independent state law ground for sustaining the judgment below, this Court should not grant certiorari review of this issue. *Michigan v. Long*, *Id.*; *Coleman v. Thompson*, *Id.*

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[4]As noted by the Court of Appeals, there is no showing that the trial judge either refused to hold a *Jackson v. Denno* hearing or declined to rule upon the issue upon timely request. PET. APP. p. 5. The trial judge is not required to rule on the issue absent a request by counsel. *Wainwright v. Sykes*, 433 U.S. at 86.

[5]Even if the Court of Appeals created a two step procedure, this Court should not grant certiorari review. Under state law, the prosecution must prove the voluntariness of a statement by a preponderance of the evidence before the jury may consider it. *State v. Franklin*, 299 S.C. 133, 382 S.E.2d 911 (1989). Clearly, requiring the State to prove compliance with *Miranda* and voluntariness in separate hearings would benefit defendants rather than harm them. Furthermore, nothing in the constitution prohibits such a practice. "Of course, the States are free, pursuant to their own law, to adopt a higher standard." *Lego v. Twomey*, 404 U.S. at 489.

C. The lower court correctly ruled that the audio portion of the videotaped field sobriety test was cumulative to the record and its admission harmless beyond a reasonable doubt.

The Petitioner does not challenge his nontestimonial, physical actions on the videotape of the field sobriety tests at the police station.[6] Instead, the Petitioner argues that the erroneous admission of the sound portion of the tape denied him due process of law. PET. pp. 18-21. The South Carolina Court of Appeals correctly decided this issue against the Petitioner.

As the Court of Appeals noted, the improper admission of custodial statements obtained in violation of *Miranda* may be harmless error. PET. APP. pp. 6-8. *See Arizona v. Fulminante*, 499 U.S. 279 (1991). A review of the facts relied upon by the lower court shows that the admission of the audio portion had no effect on the verdict:

> On April 23, 1994, Officer Hess of the Georgetown Police Department stopped Clute's vehicle after observing Clute driving erratically. Hess testified that when he approached the vehicle, he noticed a strong

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[6]A DUI suspect's physical characteristics are not testimonial and do not implicate *Miranda* concerns. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

> **odor of alcohol and Clute immediately stated, "I, I know I had to much."** Prior to arresting Clute and without reading him his *Miranda* rights, Hess had Clute perform a series of field sobriety tests. According to Hess, Clute failed the sobriety tests, includingthe horizontal gaze nystagmus test (HGN). Further, **Clute's eyes appeared glassy and there was a strong odor of alcohol about his person.** (Emphasis added). PET. APP. p. 2.

The uncontradicted evidence clearly showed that the Petitioner was operating a motor vehicle in this state while under the influence of intoxicating liquors. Additionally, the Petitioner blurted out that he had too much to drink **before** Hess spoke to him or performed the field sobriety tests.[7] Therefore, the State proved all of the elements of DUI without reference to the improper statements. *See State v. Townsend*, 321 S.C. 55, 467 S.E.2d 138 (Ct. App. 1996); S.C. CODE ANN. § 56-5-2930 (1991). Accordingly, the Court of Appeals properly concluded that the audio portion of the videotape did not affect the verdict.

Finally, the Court of Appeals correctly held that any error was *de minimis* in light of the Petitioner's obvious drunkenness on tape. Like a human pinball, the Petitioner

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[7]The Fifth and Fourteenth Amendments do not exclude volunteered statements that are not the subject of custodial interrogation. *Estelle v. Smith*, 451 U.S. 454 (1981).

literally bounced off the walls of the police station as he unsuccessfully attempted to walk a straight line. In light of the other substantial evidence of intoxication, no prejudice resulted to the Petitioner.[8] Therefore, this Court should not grant certiorari review of this issue. *Arizona v. Fulminante*, *Id.*

D. The lower court correctly ruled that the Petitioner was not in custody or entitled to *Miranda* warnings when he performed the field sobriety tests during the traffic stop.

The Petitioner argues that he was "in custody" for *Miranda* purposes during the initial stop because Corporal Hess "was clearly predisposed to arrest [him] for DUI...." PET. pp. 24-25. The Court of Appeals properly rejected this argument. PET. APP. pp. 3-5.

The *Miranda* warnings are not required if the defendant is not in custody or significantly deprived of his freedom. *Berkemer v. McCarty*, 468 U.S. 420 (1984). A

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[8]The record does not support the Petitioner's assertion that the jury could have concluded he was "merely ill or otherwise indisposed" without the audio portion of the tape. *See* PET. p. 20. The Petitioner did not testify at trial. As shown above, the only testimony in the record is that the Petitioner appeared intoxicated while he was in custody.

traffic stop, by itself, does not render a driver "in custody" because the incidental restriction on his movements is not comparable to a formal arrest. *Berkemer*, 468 U.S. at 439-41; *Pennsylvania v. Bruder*, 488 U.S. 9, 10 (1988). Furthermore, this Court has ruled that the performance of field sobriety tests following a routine traffic stop is not a custodial interrogation. *Berkemer*, *Id.*; *Bruder*; *Id.*

The Petitioner does not present any circumstances showing that the traffic stop was anything but ordinary. Instead, he asserts that his traffic stop became a custodial interrogation because he "believed" he was in custody and Corporal Hess had probable cause to arrest him for driving under the influence. PET. pp. 25-26. This assertion has no merit.

The initial determination of whether an individual was in custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. *Stansbury v. California*, 511 U.S. 318, 324-25 (1994). Furthermore, the fact that an investigation has focused on a suspect does not require police to administer *Miranda* warnings unless the suspect is in custody. *Minnesota v. Murphy*, 465 U.S. 420 (1984). Even if an officer has

probable cause to arrest the driver for a traffic offense prior to any questioning,

> A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. *Berkemer*, 468 U.S. at 442.

Therefore, although Corporal Hess suspected that the Petitioner was intoxicated, his suspicions are irrelevant in an objective determination of custody.

As the South Carolina Court of Appeals noted, there was "nothing extraordinary about the circumstances surrounding the administration of the roadside field sobriety tests in this case...." PET. APP. p. 4. Corporal Hess merely asked the Petitioner a modest number of questions and asked him to perform a balancing test in a public area that was plainly visible to passing motorists. *See* RESP. APP. at 1-90. "Treatment of this sort cannot be characterized as the functional equivalent of formal arrest." *Berkemer*, 468 U.S. at 442. Therefore, Judge Maring and the Court of Appeals correctly found that the Petitioner was not entitled to *Miranda* warnings during the field sobriety tests. This Court should deny certiorari review of this issue.

CONCLUSION

For all of the foregoing reasons, this Court should decline discretionary review of this case.

Respectfully submitted,

CHARLES M. CONDON
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HAROLD M. COOMBS, JR.
Counsel of Record

October 14, 1997
Columbia, South Carolina

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APPENDIX

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MR. HILLIARD: Call a witness? Alan Hess.

ALAN HESS, BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE CLERK (RUBY MOORE): State your name.

THE WITNESS: Alan Hess.

DIRECT EXAMINATION BY MR. HILLIARD:

Q: You are a corporal with the city police department. Is that correct?

A: Yes.

Q: All right, sir. You were employed in that regard back on April 23, 1994?

A: Yes, sir.

Q: And you arrested this defendant, Randy Ray Clute?

A: Yes, sir.

Q: All right, sir. How is it that you came to arrest Mr. Clute?

A: You, from the beginning or you just --

Q: Yes, sir, from the --

A: Okay.

Q: -- from the beginning?

A: I was traveling westbound on Front Street in the area of Cleland Street. I observed the defendant traveling south on Dozier Street making a right-hand turn onto Front Street in front of me. I observed him make a wide right hand turn, proceeded to the traffic light at Front and Fraser, turned left onto South Fraser Street. He made a wide left-hand turn. I proceeded to follow him southbound on 17. He crossed the center line several times. He changed lanes from that point in time. He went off the berm of the road. That's the side of the road closest to the sidewalk on several occasions. I activated my blue light and stopped him south of the Sampit River Bridge on a dead-end road, which is commonly known as Frontage Road. At that point in time I got out, identified myself.

Q: Prior to your asking him any questions or making any inquiry of him, what, if anything, did he say to you? Did he say anything to you when he got out of the truck, car?

A: Other than the fact that he knew that he had too much. That's the only thing he said.

Q: Can you be more specific about when you said, what, what were his exact words that you recall?

A: His exact words was, "I, I know I had too much."

Q: All right, sir, and at that point in time what happened?

A: I noticed a strong odor of an alcoholic beverage about him at which point I asked him to sep out so that I could administer some field sobriety tests.

Q: All right, sir, and then what happened.?

A: At which point after I felt that he failed his ABC's, I done a horizontal gaze nystagmus test on him at which point he failed that in my opinion. I had him stand a one-legged stand at which point he was staggering. He couldn't hold his balance at which point I, at that point in time I placed him under arrest for driving while under the influence.

[R. p. 9, line 1 - p. 11, line 6]

MR. JOYE: The second thing that I'd like to address is Mr. Hilliard says he knows of no authority that says you don't have to advise anybody of *Miranda* Rights until such time as they're placed under arrest. Well, *State versus Caulder*, I think, specifically says, citing United States Supreme Court case of *Rhode Island versus Innis* with approval, as verified by *State versus Newell*, that there are no degrees with regards to criminal activity, and if you're investigating suspected criminal activity, and the person is not free to clear, as *Sikes* says, "seized," then you have an obligation to advise them that you're investigating suspected criminal activity and that anything they say or do can and will be used against them, and I think that that's an affirmative duty, and unless the State could show that Mr. Clute knowingly, intelligently, and voluntarily waived those rights, which they've failed to do, then they should be suppressed.

I do not disagree that he had sufficient probable cause to stop him for some traffic violation. I'm just trying to, I'm just trying to think through the Code as to what, what violation it is, and unless the solicitor can enlighten me, I don't think it's a violation to make a wide turn. I don't think it's a violation to cross a lane divider, and I believe he testified that the berm -- I don't know what, what that was, still don't know what a berm is. I just think that, I mean, we, had he walked up to him and said, Your Honor, "I'm investigating suspected criminal activity. I think that you've had too much to drink to drive a car. Anything you say or do can and will be used today, but he didn't do that. I think it's undeniable that he did have a right not to say or do anything and that he's testified that he, that he at that time he didn't know, and had he known, he wouldn't have done anything, so they've got the burden under *Miranda* that he knowingly, intelligently, and voluntarily waived, and they failed to do. They've just taken the straight approach that nobody's entitled to *Miranda* Warnings on a routine traffic stop, and --

THE COURT: They're not entitled to it until they're under arrest.

MR. JOYE: Until he's under arrest.

THE COURT: That's right.

MR. JOYE: Yeah.

[R. p. 43, line 3 - p. 44, line 21].

THE COURT: All right. Then, and then you had a motion to, I assume, suppress any statements he may have made on the grounds that he had not been given his *Miranda* Warnings. I find that he was not under arrest.

MR. JOYE: I'm sorry. I did not hear that.

THE COURT: I find that he was not under arrest.

MR. JOYE: He was not under arrest?

THE COURT: That's right.

MR. JOYE: All right, sir.

THE COURT: And --

MR. JOYE: So may I ask --

THE COURT: -- since he was not under arrest, I don't think I really need to, to go into the specific findings. I would had he been under arrest and not been given his *Miranda* warnings.

[R. p. 45, line 12 - p. 46, line 1]

THE COURT: Well, let, let me rephrase. I said he's not entitled to *Miranda* Warnings unless he's under arrest, in custody. I don't know that there's much difference between being in custody and being under arrest, other than a warrant hasn't been signed. All right. The Court's ruling is then that he is not in custody for your purposes for appeal.

MR. JOYE: So that he was free to leave?

THE COURT: That's correct.

[R. p. 50, line 25 - p. 51, line 8].

MR. JOYE: Well, I don't have any evidence that they intend to use, you know, against my, I don't know what the evidence is, other than the, the, I mean, first off, this statement is a damning statement, quite frankly, and I think the Court has taken that position, and that was not furnished to me prior to the time that we've come to trial. The second thing is, is that, let's see, I don't know if the, I mean, I, the solicitor asked me to stipulate to the jurisdiction. I told him I would not. I don't have any evidence that this Court has jurisdiction. Your Honor, as I understand--

THE COURT: Was he indicted by the Grand Jury of this County on second offense driving under the influence?

MR. HILLIARD: More than first within the last ten years, your Honor.

THE COURT: Well, then that would give this Court jurisdiction. Of course, they've got to put testimony up if you don't want to stipulate.

MR. JOYE: But, but the defendant has the right anytime during the trial of a criminal case to contest jurisdiction, and that's what I'm doing.

THE COURT: Uh-huh (affirmative response).

MR. JOYE: He asked me to stipulate. I would not, so I'm moving now to dismiss on the basis that the State will be unable to prove jurisdiction. Now, let me clarify this a minute. Jurisdiction with regards to second offense. The Legislature changed the law where the, where the General Sessions Court has jurisdiction over first offense DUI. They did that three or four years ago. Otherwise, we would have been out of, out of court if they can't prove that this was a second, and so I'm challenging jurisdiction again in the interest of time before we start getting into the, into the trial. I think that, and I'm not sure of that, whether or not I have to challenge the jurisdiction before the jury is sworn. I mean, I could challenge it, but I didn't stipulate to it because they don't have any, I don't, they haven't furnished me any evidence that this is a second offense.

THE COURT: Okay.

MR. JOYE: I don't know how they're going to prove it, and I'm asking that they--

THE COURT: Motion to dismiss for lack of jurisdiction denied.

MR. JOYE: Okay.

[R. p. 52, line 13 - p. 54, line 8]

MR. HILLIARD: What I have, Your Honor, is a certified true and correct copy of the original document being a Certification for Court of the driving record of Randy Ray Clute, showing a driving under the influence conviction for 5-28-91, accompanying by, accompanied by

a certified true and correct copy of the official Order of Suspension indicating a violation of driving under the influence from April 27, 1991, that being the self-same and exact conviction that is on the certified driving record. The statute involved is 56-5-2980, Your Honor.

THE COURT: Right. Okay. That's the State's presentation?

MR. HILLIARD: Yes, sir.

THE COURT: All right.

MR. HILLIARD: Would you like to mark this as a Court's exhibit, Your Honor.

THE COURT: Let's mark it as Court's Exhibit 1.

MR. HILLIARD: Judge, we already have State's Exhibit No. 1 for Identification, that being the videotape.

THE COURT: Well, it would be 2 then, Court's Exhibit 2, I suppose, for purposes of this hearing.

MR. HILLIARD: Mr. Joye has stipulated, while we're here, Judge, Mr. Joye has stipulated as to the chain of custody in State's Exhibit No. 1 for Identification.

MR. JOYE: That is correct.

THE COURT: All right.

MR. JOYE: There is no contest with regards to the chain of custody, Your Honor.

(*Court's Exhibit No. 2* marked)

MR. JOYE: Your Honor, Mr. Hilliard has not advised the Court of all of the facts yet.

THE COURT: All right.

MR. JOYE: I assume, I thought he was, are you through?

THE COURT: Okay.

MR. HILLIARD: Yes, sir.

THE COURT: All right, sir.

MR. JOYE: A strict reading of the statute, Your Honor, that's what I'm relying on. 56-6-2980.

THE COURT: Go ahead.

MR. JOYE: 56-5-2980.

THE COURT: In what way do you think it's defective and not admissible under that section?

MR. JOYE: Sir?

THE COURT: In what way do you think it's defective and not admissible under that section?

MR. JOYE: Your honor, what Mr. Hilliard failed to tell you is, is that the conviction is a conviction reported from another state. It did not happen in South Carolina.

[R. p. 61, line 24 - p. 63, line 23].

MR. JOYE: The statute says that -- the statute was changed in 1992 -- as a result of the Supreme Court case that came out the first part of '92, and I believe was *State versus Breech*, that said you couldn't count them, so then the Legislature changed it and said you can count the, and then I believe there's the case of *State versus Tennyson* that said yes, so they, they reaffirmed the legislative act, but he's not, but, but what he's doing is he's talking about introduction of evidence under 56-5-2980, and he fails in his proof. He does not have a certified copy of a conviction nor is there one attached to that, and as I read it, there must be unless it occurred in this state. Statutes are supposed to be strictly construed against the State when they deal with criminal penalties.

THE COURT: The Court would make a finding it would be admissible.

MR. JOYE: Your Honor --

THE COURT: I note your exception.

MR. JOYE: Okay.

THE COURT: Okay.

MR. JOYE: Do you see the language that I'm talking about?

THE COURT: Yes.

MR. JOYE: And I'm just taking it as strict construction. It says, "True copies of the original on file thereof," and there is nothing attached to that --

THE COURT: Yes, sir.

MR. JOYE: -- showing that that's a certified copy of thereof and that the conviction that's reported there is a conviction that's reported in Louisiana.

THE COURT: All right, sir. Okay. Now, what I'm not trying to coerce you into stipulating at all. I do, I need, I need to know your position before we bring the jury in.

MR. JOYE: I don't mind stipulating in, to the extent that we don't waive because I think that, once again, I'm reading the law. As I read the law, they've got to have a certified copy of the conviction in order to, for it to be attached thereto.

THE COURT: No, you can't do, you can't do that because you have a right to put up evidence, and the solicitor has a right to put up any other evidence bearing on this being a second offense. It's admissible under our rules of evidence, so I don't think you could, you could --

MR. JOYE: Then I can't stipulate --

THE COURT: Okay.

MR. JOYE: -- if I end up waiving it.

[R. p. 64, line 23 - p. 66, line 19].

MR. HILLIARD: Let me show you State's Exhibit No. 2 for Identification and ask if you can identify that.

OFF. HESS: It's a certified copy of a driver's record.

MR. HILLIARD: All right, sir. Has that been requested by the police department?

OFF. HESS: That is correct.

MR. HILLIARD: And it appears here in court today by virtue of the police department?

OFF. HESS: Yes, sir.

MR. HILLIARD: We'd offer it into evidence, Your Honor.

MR. JOYE: Objection, as previously noted.

THE COURT: All right. Sustained, and the objection is continuing.

MR. JOYE: And we object to it, you know, coming in through this witness, but be that as it may.

THE COURT: All right.

MR. HILLIARD: So it's admitted, Your Honor.

THE COURT: It's in. It's in. Yeah, it's in evidence, over objection of counsel.

[R. p. 67, line 8 - p. 68, line 2].

THE COURT: All right. It's my understanding, Solicitor, the State has rested. Is that correct?

MR. HILLIARD: Yes, sir.

THE COURT: All right.

[R. p. 114, lines 8-11].

MR. JOYE: Your Honor, just for the record we move for a directed verdict at the close of the State's case on grounds previously stated. I think it would be waste of time to, to go into them, and we have no evidence that we intend to put up.

THE COURT: All right. Your, your motion is, for directed verdict is denied.

[R. p. 114, line 24 - p. 115, line 5].

THE COURT: All right. Motions?

MR. JOYE: My motion may obviate the necessity of having the jury come out. I'd move for a mistrial.

THE COURT: Okay.

MR. JOYE: Last night I kept, was concerned about something that Mr. Hilliard did at the beginning of the trial, and if I may state my grounds for mistrial, the grounds for the mistrial is, is in accordance with about thirteen or fourteen South Carolina cases that I could find on point, it is a reversible error to put before a jury evidence of a prior conviction; that in this state evidence of a prior conviction is admissible only for impeachment purposes. Since the defendant did not take the stand, it's impermissible to put to the jury the fact that he had a prior driving under the influence conviction.

Furthermore, the driving under the influence conviction would not be even be admissible for impeachment, unless it was a crime of moral turpitude, and it is not.

Historically, Judge, the reason why, as I understand it, the reason why you, you either waive or you stipulate or you, to jurisdiction, has to do with the fact that about, up until about four years ago, circuit court did not have jurisdiction over a driving under the influence first offense, and, therefore, if they didn't prove jurisdiction, then it would get dismissed on that technicality. When the Legislature changed the law, it became no longer necessary to "prove jurisdiction" because the Court has concurrent jurisdiction of the first offense just like magistrate's court does; so, therefore, I submit to you that it's error. I have a complete cite of cases starting with a 1923 case all the way up to the present time, and I'll be glad to, you know, cite

them for you for the record, but it's all in here. It's all in the computer. I mean, I spent two hours last night just pulling them up one right after the other.

The only reason why the solicitor would do it would be to prejudice the jury. I mean, he's got to show some motive, some intent, some absence of a State, common scheme, and I have, I mean, I, I'm satisfied that the Court is familiar with the, with cases, and, and I have to make a motion in the event, you know, the decision were to go adverse to me and be able to protect the record for appeal by moving for a mistrial on that issue.

THE COURT: All right. Motion is denied.

[R. p. 119, line 16 - p. 121, line 9].